Supreme Court, U.S.
FILED
041491 MAY 6 - 2005
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

STATE OF MAINE,

Petitioner,

v.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR WRIT OF CERTIORARI

G. STEVEN ROWE
Attorney General of Maine
R. CHRISTOPHER ALMY
District Attorney, Penobscot County
DONALD W. MACOMBER*
LAURA YUSTAK SMITH
Assistant Attorneys General
WILLIAM R. STOKES
Deputy Attorney General
CHARLES K. LEADBETTER
Special Assistant Attorney General
C. DANIEL WOOD
Assistant District Attorney
6 State House Station
Augusta, Maine 04333
(207) 626-8800
**Counsel of Record* *Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Fourth Amendment seizure occurs merely because a police officer taps on the window of a parked car in a public place and requests the driver to roll down the window.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	8
I. The Maine Law Court, By Deferring to the District Court's Faulty Seizure Determination, Contravened the Reasonable Person Standard and the Standards of Appellate Review Announced by this Court	9
II. The Maine Law Court has Decided an Important Issue of Fourth Amendment Law in a Way that Conflicts with Decisions of Federal Courts of Appeal, State Supreme Courts, and Other State Courts, as well as with this Court's Decisions	12
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES:

Adams v. State, 758 S.W.2d 709 (Ark. App. Ct. 1988), *cert. denied*, 489 U.S. 1018 (1989) 15

Akins v. State, 596 S.E.2d 719 (Ga. App. 2004) 15, 16

Borowicz v. North Dakota Dep't of Transp., 529 N.W.2d 186 (N.D. 1995) 16

Cady v. Dombrowski, 413 U.S. 433 (1973) 21

Ebarb v. State, 598 S.W.2d 842 (Tex. Crim. App. 1979) 16

Ex Parte Betterton, 527 So.2d 747 (Ala. 1988) 15

Florida v. Bostick, 501 U.S. 429 (1991) 9, 16, 17, 18, 21

Florida v. Royer, 460 U.S. 491 (1983) 8, 9, 16, 17, 18

I.N.S. v. Delgado, 466 U.S. 210 (1984) 9, 16, 18

Medley v. State, 630 So.2d 163 (Ala. Crim. App. 1993), *rehearing denied*, 655 So.2d 61 (Ala. Crim. App. 1994), *cert. denied*, 665 So.2d 1033 (Ala. 1994) 15

Ornelas v. United States, 517 U.S. 690 (1996) 6, 8, 11

People v. Clark, 541 N.E.2d 199 (Ill. App. 1989) 14

People v. Murray, 560 N.E.2d 309 (Ill. 1990) 13

State v. Brewer, 1999 ME 58, 727 A.2d 352 6

State v. Chapman, 640 N.W.2d 566 (Wis. App. 2002) 16

State v. Gulick, 2000 ME 170, 759 A.2d 1085 7

State v. Knox, 939 P.2d 710 (Wash. Ct. App. 1997) 14

State v. O'Neill, 62 P.3d 489 (Wash. 2003) 14

TABLE OF AUTHORITIES – Continued

Page

State v. Smith, 223 S.E.2d 30 (Ga. App. 1975), *overruled*, 596 S.E.2d 719 (Ga. App. 2004) 16

State v. Thorn, 917 P.2d 108 (Wash. 1996) 14

State v. Zubizareta, 839 P.2d 1237 (Id. 1992) 14

United States v. Adegbite, 846 F.2d 834 (2d. Cir. 1988) 13

United States v. Baker, 290 F.3d 1276 (11th Cir. 2002) 13

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005) 12

United States v. Drayton, 536 U.S. 194 (2002) .....*passim*

United States v. Mendenhall, 446 U.S. 544 (1980) 6, 9, 17, 18

CONSTITUTIONAL PROVISION:

U.S. Const. amend. IV .....*passim*

STATUTUTORY PROVISIONS & RULES:

15 M.R.S.A. § 2115-A(5) 5

28 U.S.C. § 1257(a) 1

29-A M.R.S.A. § 2411(1) 3

29-A M.R.S.A. § 2412-(A)(1), (3) 3

M.R.App.P. 21(b) 5

M.R.Crim.P. 41A(d) 4

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

W. LaFave, "Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment 'Seizures'?" 1991 U.Ill.L.Rev. 729 (1991) 21

4 W. LaFave, *Search & Seizure*, § 9.4(a) at 433 (4th ed. 2004) 11, 21

4 W. LaFave, *Search & Seizure*, §9.4(c) at 440-453 (4th ed. 2004) 21

PETITION FOR A WRIT OF CERTIORARI

The State of Maine respectfully petitions for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court sitting as the Law Court (hereinafter "Maine Law Court") in this case.

OPINIONS BELOW

The opinion of the Maine Law Court (App. 1-9) affirming the Maine District Court's suppression order is reported at 2005 ME 26, 868 A.2d 188. The order of the Maine District Court granting respondent's motion to suppress (App. 10-13) is unreported.

JURISDICTION

The Maine District Court's May 26, 2004 oral order granting respondent's motion to suppress was entered in the criminal docket on June 1, 2004. The District Court's June 29, 2004 written findings of fact and conclusions of law were entered on July 1, 2004. The opinion of the Maine Law Court affirming the District Court's suppression order was both issued and entered in the Law Court docket on February 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Just after midnight on January 31, 2004, a University of Maine police officer was patrolling the south campus in Orono. (App. 2, 10). She observed what she considered to be suspicious operation by the driver of a red Saab. (App. 2, 10). She had been following the Saab when it turned into a university steam plant parking area. (App. 2, 10). The officer asked her supervisor, Sergeant Robert Norman, who was patrolling in an unmarked car, to observe any further operation of the red Saab. (App. 2, 11). She gave Sergeant Norman a description of the vehicle and told him that she had seen the vehicle turn into the university parking lot. (App. 11).

Sergeant Norman immediately proceeded to the steam plant parking lot. (App. 2, 11). He found the red Saab, and noticed that it was parked. (App. 2, 11). He could tell that the engine was running because he could see the exhaust on this very cold night. (App. 2, 11). Sergeant Norman parked his unmarked car far enough away from the red Saab that the driver of that car could have backed the car out if he wished to do so. (App. 3, 11). At no point did the sergeant activate the emergency lighting on his vehicle.

(M.T. 19).[1] The sergeant watched the red Saab for about five minutes and saw the windows begin to steam up. (App. 2-3, 11).

Sergeant Norman got out of his cruiser and approached the driver's side of the Saab. (App. 3, 11). He could see smoke emanating from the passenger side window. (App. 2, 11). While the sergeant could not see through the fogged-up back window of the Saab, he could see through the side window. (App. 3, 11).

Sergeant Norman, who was in uniform, approached the driver's window, and tapped, or rapped, on it with his knuckle. (App. 3, 12; M.T. 22). The sergeant, in a voice just loud enough to be heard over the running engine, then "asked" or "requested" the operator to "please roll down the window." (App. 3, 12; M.T. 28-30).

The driver, the respondent Joshua Patterson, did not roll the window down as the sergeant requested. (App. 3). Instead, he opened the driver's side door, and the sergeant made observations that led him to arrest the respondent for operating under the influence. (App. 3).

The respondent was later charged in the Maine District Court located at Bangor with Class D operating under the influence, in violation of 29-A M.R.S.A. § 2411(1), and Class E operating after suspension, in violation of 29-A M.R.S.A. § 2412-(A)(1), (3). (App. 3). Respondent entered pleas of not guilty and filed a motion to suppress the evidence seized after the sergeant asked

---

[1] References to the transcript of the hearing on respondent's motion to suppress prepared by the State of Maine Electronic Recording Division shall be as follows: "(M.T.)."

him to roll down his window, arguing that the request constituted a Fourth Amendment seizure that was unsupported by reasonable articulable suspicion. (App. 3; M.T. 3, 31-33).

Following a testimonial hearing on the motion at which both officers testified but the respondent did not, the District Court granted the motion to suppress. (App. 4). After the arguments, the court stated, "the first question for the court is whether or not this was an inquiry or whether it was a command directive – a seizure." (M.T. 33). The court acknowledged that the respondent's failure to testify left it "open to question . . . whether he recognized it was a police officer tapping on the window." (M.T. 34). The court indicated that it was "going on the objective facts and then trying to plug in what probably was going on in his head." (M.T. 34).

After determining that there was no reasonable suspicion to justify a seizure, the court then returned to the question of whether the officer's words and conduct amounted to a request or an order:

> I don't have the defendant's testimony. I have the testimony of tap, tap, roll down the window or wind it down. Uniformed police officer – the Court's satisfied that on the evidence, hearing nothing more, it was a seizure not warranted, observations suppressed, and whatever came afterwards.

(M.T. 35). Following the hearing, the State filed a motion for findings of fact and conclusions of law pursuant to M.R.Crim.P. 41A(d). (App. 4). In its motion, the State specifically asked the District Court to "specify those

actions of Sergeant Norman which constituted a Fourth Amendment seizure."

The District Court issued written findings and conclusions on June 29, 2004. (App. 10-13). In its written order, the court found that Sergeant Norman, who was in uniform, rapped on the operator's window and "asked" the operator to roll down the window. (App. 12). The court further found:

> As indicated at hearing, the determining factor for the Court was whether or not this was a seizure or simply an interaction, a conversation, between the Sergeant and the Defendant. The factors that led the Court to conclude that it was a seizure are:
>
> 1. The officer was in uniform;
>
> 2. The officer initiated the contact under circumstance[s] in which an ordinary person in Defendant's situation would have expected privacy on public contact; [and]
>
> 3. The Sergeant rapped on the driver's side window and requested that the window be rolled down.

(App. 12). The Maine District Court then concluded as a matter of law "that more probably than not, [the] defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation." (App. 12).

After obtaining permission from the Attorney General pursuant to 15 M.R.S.A. § 2115-A(5) and M.R.App.P. 21(b), the petitioner filed an interlocutory appeal to the Maine Law Court from the Maine District Court's suppression

order. (App. 1, 4). On February 9, 2005, the Maine Law Court affirmed the order granting the motion to suppress. (App. 1-9).

The Maine Law Court identified the Fourth Amendment standard to be applied as "whether a reasonable person would have believed that he was not free to leave." (App. 5). *Citing United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Maine Law Court also noted that it would be independently reviewing whether the Maine District Court's historical findings of fact constituted a Fourth Amendment seizure as a matter of law. (App. 5). *See Ornelas v. United States*, 517 U.S. 690 (1996).

The Maine Law Court, in distinguishing one of its prior cases,[2] stated that the officer "made verbal contact with Patterson, telling him to roll down his window." (App. 6). The court found that the Maine District Court's oral comments after the suppression hearing and the last sentence of its written findings of fact and conclusions of law made clear that the Maine District Court had concluded that the officer's "request" was, in fact, an "order," and that a reasonable person would not feel free to disobey an order from a police officer. (App. 7). The Maine Law Court concluded that Sergeant Norman's "command" constituted an unreasonable seizure, and that the Maine District Court properly granted the motion to suppress. (App. 7).

---

[2] *State v. Brewer,* 1999 ME 58, 727 A.2d 352, in which the Maine Law Court held that a driver of a parked car was not seized for Fourth Amendment purposes when two plainclothes detectives approached him while displaying their badges in their hands. *Id.* at ¶ 13, 727 A.2d at 355.

Later in its opinion, while again distinguishing one of its prior decisions,[3] the Maine Law Court found that "Sgt. Norman instructed Patterson to roll down the window." (App. 7). From this fact, the Maine Law Court concluded that "[t]he record supports the [district] court's conclusion that a reasonable person in Patterson's position would not 'feel free to decline the officer's requests or otherwise terminate the encounter.'" (*quoting United States v. Drayton*, 536 U.S. 194, 202 (2002)). (App. 7).

The Maine Law Court stated that this was "an admittedly close case," and that "[o]ther courts confronting similar facts have come to differing conclusions." (App. 8). The Maine Law Court observed that the case "turn[ed] on the precise nature of Sgt. Norman's statement, and how a reasonable person would interpret that statement." (App. 8). The Maine Law Court then stated, "As an appellate court, we decline to review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement." (App. 8). The Maine Law Court did not mention, however, that the Maine District Court made *no* findings of fact regarding the officer's tone and volume of voice. With respect to the circumstances, the Maine District Court found only that the officer rapped on the window and "asked" or "requested" that the respondent roll down his window. (App. 10-13). Finally, the Maine Law Court held that, "[b]ecause the trial court reasonably could have found that Sgt.

---

[3] *State v. Gulick*, 2000 ME 170, 759 A.2d 1085, in which the Maine Law Court held that a driver of a car parked in a closed health care facility parking lot had not been seized for Fourth Amendment purposes when an officer approached the parked car and asked the driver if he was okay. *Id.* at ¶ 4, 759 A.2d at 1086.

Norman's comment constituted an order, we affirm the suppression order." (App. 8).

REASONS FOR GRANTING THE WRIT

There are two compelling reasons why this Court should review the Maine Law Court's decision in this case. First, the Maine Law Court did not apply the appropriate Fourth Amendment appellate standard of review in several respects. It effectively applied an erroneous subjective standard, in direct contravention of the objective "reasonable person" standard announced by this Court in *Florida v. Royer*, 460 U.S. 491 (1983) and its progeny, when it improperly deferred to the Maine District Court's seizure determination, a mixed question of law and fact requiring *de novo* review as announced by this Court's decision in *Ornelas v. United States*, 517 U.S. 690, 699 (1996), when it was readily apparent that the District Court had erroneously applied a subjective standard to make its legal determination. The Maine Law Court compounded its error by failing to defer to the Maine District Court's express findings of historical fact in apparent disregard of the applicable standard of review that this Court established in *Ornelas*.

Second, the Maine Law Court's decision that a Fourth Amendment seizure occurs when an officer taps or raps on the window of a car parked in a public place and verbally "requests" the driver to roll his window down, with no other show of authority, is in conflict with most decisions of the federal circuit courts of appeal and other state courts that have addressed similar factual scenarios. It also conflicts with this Court's decisions in *United States v.*

Drayton, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); and *Florida v. Royer*, 460 U.S. 491 (1983).

I. The Maine Law Court, By Deferring to the District Court's Faulty Seizure Determination, Contravened the Reasonable Person Standard and the Standards of Appellate Review Announced by this Court.

While the Maine Law Court properly articulated the appellate standard regarding whether respondent was seized (App. 5, 7) – namely, that it should review *de novo* the trial court's historical findings of fact to determine whether a reasonable person in the respondent's position would feel free to decline the officer's requests or otherwise terminate the encounter, *see United States v. Drayton*, 536 U.S. 194, 202 (2002), and *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) – it did not apply that standard. Instead, the Maine Law Court deferred to the District Court's seizure determination, even though the District Court applied an erroneous subjective standard. For that reason alone, this Court may wish to grant the petition and summarily reverse the decision of the Maine Law Court.

This Court has repeatedly held that the determination of whether or not a Fourth Amendment seizure has occurred is an *objective* test – would a reasonable person have felt free to ignore the officer's requests or otherwise terminate the encounter? *See, e.g., Florida v. Royer*, 460 U.S. 491, 502 (1983) (applying reasonable person test); *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (same); *Florida v. Bostick*, 501 U.S. 429, 436-437 (1991) (same); *United States v. Drayton*, 536 U.S. 194, 202 (2002) (same). The

District Court, however, applied a *subjective* test in determining as a matter of law whether respondent was seized within the meaning of the Fourth Amendment. The first indication of the trial court's misapprehension of the correct legal standard came at the suppression hearing, when the court stated that it was "going on the objective facts and then trying to plug in what probably was going on in [Patterson's] head." (M.T. 34). The trial court confirmed its error in its subsequent written findings of fact and conclusions of law when it stated that: "[t]he court finds that more probably than not, [the] *defendant perceived* the Sergeant's acts and words as a command from a police officer and not as a request for a conversation." (App. 12 (emphasis added)).

The Maine Law Court, while mouthing the correct standard, effectively applied that erroneous, subjective standard by deferring to the District Court's seizure determination. After acknowledging that this was a "close case," the Maine Law Court concluded that the District Court was in the best position to determine whether Sergeant Norman requested respondent to roll down the window of his car or ordered him to do so. (App. 8). Yet the Law Court did not defer to the specific historical facts found by the District Court. Rather, it deferred to the District Court's holding on the mixed question of law and fact as to whether those facts satisfied the constitutional standard, *i.e.*, amounted to a seizure. As demonstrated above, however, the District Court plainly violated this Court's precedents in how it decided that mixed question of law and fact.

Deferring to a ruling premised on a misapplication of Fourth Amendment law was not the Maine Law Court's only fundamental error. The Law Court also erred by

deferring *at all* to the District Court on the seizure determination. In *Ornelas v. United States*, 517 U.S. 690, 696-699 (1996), this Court held that an appellate court should review mixed questions of law and fact *de novo* in Fourth Amendment cases. Thus, the Maine Law Court violated two core Fourth Amendment principles announced by this Court – failing to independently review the lower court's seizure determination and deferring to a seizure determination based on a manifestly erroneous standard.

Had the Maine Law Court deferred not to the District Court's misguided seizure determination, but instead to the District Court's "findings of historical fact," as it should have, *see Ornelas*, 517 U.S. at 699, it could not have found that respondent was seized. The District Court expressly found as fact in this case, based on the officer's unrebutted testimony, that Sergeant Norman "asked" or "requested" the respondent to roll down his car window. (App. 12; M.T. 28-29). The Maine Law Court in its opinion, however, restated these findings as the officer "instruct[ing]," "telling," or "command[ing]" respondent to roll down the window. (App. 6, 7). The difference is more than semantic in this case, as "[a] request that the suspect . . . roll down the window would seem . . . permissible, but the same would not be true of an order that he do so." 4 W. LaFave, *Search & Seizure*, § 9.4(a) at 433 (4th ed. 2004) (collecting cases). *Ornelas* dictates that the Maine appellate court was not free to substitute its own factual findings for those rationally made by the trial court.

Using the proper standard of review established by this Court in *Ornelas*, the facts of this case are simple – the officer tapped on the window of the respondent's car and asked him to roll it down. The legal question that should have been independently addressed by the Maine

Law Court is whether a reasonable person under those circumstances would have felt free to disregard the officer's request. As the majority of the cases in the next section of this petition demonstrate, the Maine Law Court's conclusion that such a person would not have felt free to disregard the request was incorrect.

II. The Maine Law Court Has Decided an Important Issue of Fourth Amendment Law in a Way that Conflicts with Decisions of Federal Courts of Appeal, State Supreme Courts, and Other State Courts, as well as with this Court's Decisions.

A. The historical facts rationally found by the District Court are that the officer "asked" or "requested" a driver of a car parked in a public place to roll down the window. The Maine Law Court's holding that this amounts to a Fourth Amendment seizure directly conflicts with most other decisions of the federal and state courts that have considered similar factual scenarios.

1. Federal Court Decisions

• *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005): Reversing a contrary district court opinion, the Eighth Circuit recently held that a uniformed police officer did not seize the defendant for Fourth Amendment purposes when he parked his marked cruiser in front of the defendant's car, which was parked in an alley behind a shopping mall late at night, got out of the cruiser, approached the parked car with his flashlight on his badge and his hand on his holstered gun, and knocked on the window of the car three times. *Id.* at 1075. The Eighth Circuit stated that its

conclusion that there was no seizure on these facts until the officer ordered the occupants out of the vehicle was consistent with "scores of other cases holding similar police-citizen encounters did not implicate the Fourth Amendment." *Id.* (collecting cases).

- *United States v. Baker*, 290 F.3d 1276 (11th Cir. 2002): No Fourth Amendment seizure occurred when two plain-clothes police officers approached a running vehicle that had stopped only because of the traffic in front of it, displayed their badges, asked the vehicle's occupants to roll down their windows, and began asking questions of the occupants. *Id.* at 1277.

- *United States v. Adegbite*, 846 F.2d 834 (2d. Cir. 1988): No Fourth Amendment seizure occurred when two plain-clothes DEA agents waved for a moving truck to stop in a parking lot, identified themselves to the occupants as police officers, and asked the occupants for identification. *Id.* at 838.

2. State Supreme Court Decisions

- *People v. Murray*, 560 N.E.2d 309 (Ill. 1990): No Fourth Amendment seizure occurred when two uniformed police officers parked behind a car parked beside the highway; got out of their car and approached the window of the driver, who was apparently asleep; knocked on the window; and, upon the driver waking, asked him to get out of the car and produce some identification. *Id.* at 313. Interestingly, the Illinois Supreme Court reversed the intermediate court of appeals, which had held, contrary to the findings of the trial court, that the officers "commanded," "ordered," and "demanded" that the defendant exit the vehicle and produce identification. *Id.* Like the

Eighth Circuit, the Illinois Supreme Court stated that its decision was supported by "the great weight of authority." *Id.* (collecting cases). *See also People v. Clark*, 541 N.E.2d 199 (Ill. App. 1989) (officer's approach to vehicle parked in public place, tap on the window, and indication to driver to roll down the window does not constitute Fourth Amendment seizure).

- *State v. O'Neill*, 62 P.3d 489 (Wash. 2003): Interpreting its parallel state constitutional provision regarding searches and seizures, the Washington Supreme Court held that the driver of a vehicle parked in a public place had not been seized when an officer approached the driver, shined a flashlight in the driver's face, and asked the driver to roll down the window. *Id.* at 497-498. Relying on its prior decision in *State v. Thorn*, 917 P.2d 108 (Wash. 1996), which interpreted the Fourth Amendment, the state supreme court observed that because drivers of cars parked in public places do not have the same expectation of privacy as drivers of cars parked in private places, it is not an unreasonable intrusion for officers to approach drivers of vehicles parked in public parking lots to engage them in conversation. 62 P.2d at 497-498. *See also State v. Knox*, 939 P.2d 710, 714-715 (Wash. App. Ct. 1997) (officer's approach to driver parked on a ferry, repeated requests to roll down window, and engaging driver in conversation was not a Fourth Amendment seizure).

- *State v. Zubizareta*, 839 P.2d 1237 (Id. 1992): The driver of a car parked on a public street had not been seized when an officer approached him and requested that he roll down the window. *Id.* at 1242.

3. State Intermediate Appellate Court Decisions

- *Akins v. State*, 596 S.E.2d 719 (Ga. App. 2004): The court observed that "police officers may approach a citizen, ask for identification, *ask him to roll down a window* or step out of a car, and freely question him without any articulable suspicion, as long as the officers do not detain the citizen or create the impression that the citizen may not leave." *Id.* at 722 (emphasis added). In *Akins*, a police officer, who was concerned for the safety of a female passenger in a car parked beside a private baseball park, parked his cruiser, approached the passenger side of the car and asked the woman to roll down her window. *Id.*

- *Medley v. State*, 630 So.2d 163 (Ala. Crim. App. 1993): No reasonable suspicion was required when a state trooper stopped to offer assistance to the driver of a car parked on the shoulder of a public road, tapped on the window and requested the driver to roll down the window. *Id.* at 165. The appeals court relied on the Alabama Supreme Court's opinion in *Ex Parte Betterton*, 527 So.2d 747 (Ala. 1988), in which the state supreme court held that no Fourth Amendment seizure had occurred when two police officers parked their cruiser, with its bright lights on, either behind or beside a car parked in a public park, approached and knocked on the driver's window.

- *Adams v. State*, 758 S.W.2d 709, 709-710 (Ark. App. Ct. 1988), *cert. denied*, 489 U.S. 1018 (1989): No Fourth Amendment seizure occurred when a police officer pulled his cruiser in behind a car parked in the dark beside a high school, shined a spotlight on the car, got out of his cruiser, approached the driver's side window, tapped on the window and asked the driver for identification.

• *State v. Chapman*, 640 N.W.2d 566 (Wis. App. 2002): No Fourth Amendment seizure occurred when a uniformed police officer in a marked cruiser got out of his cruiser, approached a car that was backing out of a parking spot in a tavern parking lot, knocked twice on the window, and asked the driver to roll down the window. *Id.* The court of appeals held that the officer, like any citizen, had the right to approach the parked car, rap on the window, and ask the driver to lower the window. *Id.*

In contrast to these decisions, the North Dakota Supreme Court, in *Borowicz v. North Dakota Dep't of Transp.*, 529 N.W.2d 186 (N.D. 1995), held that an officer's request to the driver of a car parked on a public street to open the door and produce his license "arguably" could be a Fourth Amendment seizure. *Id.* at 188. The state supreme court observed that the requests "could be interpreted as an order 'to do something' depending on how it was made." *Id. See also Ebarb v. State*, 598 S.W.2d 842 (Tex. Crim. App. 1979) (observing in dicta that when a person is sitting in a parked car and an officer orders the person to roll down the window or to open the car door, "there is at that point a temporary seizure." *Id.* at 850 (*citing State v. Smith*, 223 S.E.2d 30 (Ga. App. 1975)).[4]

B. This Court's prior decisions in *United States v. Drayton, Florida v. Bostick, I.N.S. v. Delgado*, and *Florida v. Royer* also dictate as a matter of law that a Fourth Amendment seizure has not occurred merely because a police officer has "requested" a citizen to do something.

---

[4] *Smith* has been overruled by the Georgia Court of Appeals. *See Akins*, 596 S.E.2d at 722.

In *Florida v. Royer*, 460 U.S. 491 (1983), a majority of the Court first adopted the Fourth Amendment seizure standard originally articulated by Justice Stewart (joined by then-Associate Justice Rehnquist) in *United States v. Mendenhall*, 446 U.S. 544, 555 (1980), that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Royer*, 460 U.S. at 502-503, 514-515, 524. Later, in *Florida v. Bostick*, 501 U.S. 429 (1991), the Court recognized that for situations such as the present case, where the person is in a location that the person has no desire to leave, "the appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter." *Id.* at 436.

Justice Stewart, in *Mendenhall*, provided examples of circumstances that might indicate a seizure had taken place, including, "[t]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 555. Justice Stewart, along with current-Chief Justice Rehnquist, would have held in that case that a seizure did not take place merely because law enforcement officers approached the defendant in a public place, asked her for identification, and posed a few questions to her. *Id.* at 556.

The four justice plurality in *Royer* (Justice White, joined by Justices Stevens, Marshall, and Powell) agreed with Justice Stewart's position: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another

public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." 460 U.S. at 497. Three dissenting justices (then-Associate Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor) agreed with the plurality that the defendant had not been seized when two detectives approached him in an airport concourse, identified themselves as officers, asked to speak to him, and asked for his airline ticket and for some identification. *Id.* at 524 n. 3.

In *I.N.S. v. Delgado*, 466 U.S. 210 (1984), then-Associate Justice Rehnquist, writing for a majority of the Court, stated that

> "[p]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. . . . Unless the circumstances of the encounter are so intimidating that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment."

Id. at 216. The Court held that immigration agents did not violate the Fourth Amendment when they approached employees in a factory, asked them questions, and requested identification while other agents were posted at the exits. *Id.* at 212.

The Court first applied the *Mendenhall-Royer* standard to a suspicionless narcotics interdiction bus sweep in *Florida v. Bostick*, 501 U.S. 429 (1991). The Court held that the Florida Supreme Court erred when it "adopted a *per se* rule prohibiting the police from randomly boarding buses as a means of drug interdiction." *Id.* at 435, 440.

Justice O'Connor, writing for a six-Justice majority, stated that "if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure." *Id.* at 434. The Court, while remanding to the state court to decide the seizure issue in the first instance using the proper legal standard, observed that there was "some doubt whether a seizure occurred" when two officers approached the defendant on the bus, asked for his ticket and identification, and requested his consent to search his luggage. *Id.* at 437.

In a similar case eleven years later, *United States v. Drayton*, 536 U.S. 194 (2002), the Court expressly held that a Fourth Amendment seizure did not take place when three officers conducted another suspicionless narcotics interdiction operation on a bus. Justice Kennedy, writing for another six-Justice majority, stated:

> There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not of its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her own decision not to cooperate with police on a bus than in other circumstances.

Id. at 204.

When Sergeant Norman's conduct is objectively measured against other police conduct already found by this Court *not* to have constituted a seizure, it is evident

that he did not seize respondent. As in *Drayton* and its predecessors, there was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, and no threat. In contrast to *Drayton* and its predecessors, and presenting a less coercive presence than the officers did in *Drayton*, Sergeant Norman was alone when interacting with respondent, and never touched respondent before asking him to roll down the window.

Additionally, there is no evidence that Sergeant Norman used an authoritative tone of voice when he asked respondent to roll down his window. In fact, the Maine Law Court recognized that the officer prefaced his request with the word "please." (App. 3). While the Maine Law Court also declined to draw its own inferences regarding the officer's tone of voice from the appellate record, the Maine Law Court failed to mention that the trial court did not articulate any findings regarding the officer's tone of voice despite the petitioner's specific request that the court identify all factors it had considered to conclude that the officer had seized respondent.

Unquestionably, if respondent had been standing outside of his vehicle, or even sitting in his vehicle with the window down, Sergeant Norman would have been free to approach him, ask him some questions, and request identification without implicating the Fourth Amendment. This Court's precedents, as well as the vast majority of other federal and state courts, strongly suggest that the mere fact that the officer requested respondent to remove the barrier to such a conversation, his window, should not change that result.

Law enforcement officers are called upon to interact with motorists in parked cars on a frequent, perhaps daily,

basis. This Court recognized over thirty years ago in *Cady v. Dombrowski*, 413 U.S. 433 (1973) that "[t]he extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Id.* at 441. The level of suspicion, if any, that a law enforcement officer must possess before approaching a parked car and requesting the operator to roll down the window under these circumstances is an important, recurring question that this Court should resolve.

Even Professor LaFave, the noted Fourth Amendment commentator and a harsh critic of this Court's *Bostick* and *Drayton* opinions (*see, e.g.*, W. LaFave, "Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment 'Seizures'?," 1991 U.Ill.L.Rev. 729 (1991); 4 W. LaFave, *Search & Seizure*, §9.4(c) at 440-453 (4th ed. 2004)), has acknowledged that "the mere approach and questioning of . . . persons [seated in parked vehicles] does not constitute a seizure." *Id.* at § 9.4(a) at 433. Moreover, he continues, "[t]he result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to the conversation." *Id.*

This case presents this Court with an opportunity to harmonize the split in authority regarding this important issue of Fourth Amendment law that the Maine Law Court recognized in its decision (App. 8) by holding that the Fourth Amendment is not implicated merely because a law enforcement officer has requested the driver of a vehicle parked in a public place to remove the barrier to an entirely constitutional conversation.

CONCLUSION

This Court should grant the petition for a writ of certiorari and summarily reverse the decision of the Maine Law Court, or, in the alternative, set the case for a hearing on the merits.

Respectfully submitted,

G. STEVEN ROWE
Attorney General of Maine
R. CHRISTOPHER ALMY
District Attorney, Penobscot County
DONALD W. MACOMBER*
LAURA YUSTAK SMITH
Assistant Attorneys General
WILLIAM R. STOKES
Deputy Attorney General
CHARLES K. LEADBETTER
Special Assistant Attorney General
C. DANIEL WOOD
Assistant District Attorney
6 State House Station
Augusta, Maine 04333
(207) 626-8800
Counsel of Record *Counsel for Petitioner*

APPENDIX

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2005 ME 26
Docket: Pen-04-444
Submitted
On Briefs: December 8, 2004
Decided: February 9, 2005

Panel: SAUFLEY, C.J., and CLIFFORD, *DANA*, ALEXANDER, and CALKINS, JJ.

STATE OF MAINE

v.

JOSHUA PATTERSON

DANA, J.

[¶1] The State of Maine appeals from a judgment entered in the District Court (Bangor, *Russell, J.*) granting Joshua Patterson's motion to suppress evidence obtained after a University of Maine police officer approached his parked vehicle. The State argues that Patterson was not seized within the meaning of the Fourth Amendment, and that the evidence should have been admitted in the State's prosecution of Patterson for OUI (Class D), pursuant to 29-A M.R.S.A. § 2411(1) (1996),[1] and operating after suspension (Class E), pursuant to 29-A M.R.S.A. § 2412-A(1), (3) (1996).[2] Because the

[1] Title 29 M.R.S.A. § 2411(1) was repealed and replaced by P.L. 2003, ch. 452 §§ Q-77 to Q-83 (effective July 1, 2004), *codified at* 29-A M.R.S.A. § 2411(1-A) (Supp. 2004).

[2] Title 29-A M.R.S.A. § 2412-A(1) was repealed and replaced by P.L. 2003, ch. 452 §§ Q-84 to Q-85 (effective July 1, 2004), *codified at* 29-A M.R.S.A. § 2412-A(1-A) (Supp. 2004). Title 29-A M.R.S.A. § 2412-A(3) was amended by P.L. 2003, ch. 673 § TT-5 (effective July 30, 2004), *codified at* 29-A M.R.S.A. § 2412-A(3) (Supp. 2004).

record supports the court's determination that the officer seized Patterson by ordering him to roll down his window, we affirm.

I. BACKGROUND

[¶2] The facts of this case are not disputed. Shortly after midnight on January 31, 2004, a University of Maine campus police officer observed Patterson's automobile, a red Saab, driving on the south end of the campus. The officer observed the driver engage his turn signal and slow down as the Saab approached an intersection. Before the turn, however, the driver disengaged the turn signal and continued down the road. The police officer began to follow the Saab, but she did not engage the cruiser's emergency lights.

[¶3] The cruiser followed Patterson's vehicle until it turned into a frequently used parking lot and pulled into a marked, legal parking space. The officer did not observe any traffic violations or other illegal conduct. She later testified that she was suspicious of the vehicle because of the initial, aborted turn and its "slightly erratic" acceleration and deceleration.

[¶4] After Patterson's car pulled into the parking space, the patrol officer used her police radio and requested that another officer in an unmarked vehicle take over surveillance. Sgt. Robert Norman responded to the request. Upon arriving in the parking lot, Sgt. Norman noticed that the Saab's engine was still running. He saw the car's rear window begin to fog up, and noticed what appeared to be cigarette smoke coming from the passenger side.

[¶5] After observing the car for five minutes, Sgt. Norman pulled his unmarked car around the row of vehicles and parked it in a spot out of view of those inside the Saab. Sgt. Norman, who was wearing his uniform, got out of his car and approached Patterson's car. He later testified that he was suspicious because the occupants had remained in the car on a cold night, rather than exiting the vehicle and proceeding indoors. He suspected that the occupants might be using drugs or drinking alcohol inside the car.

[¶6] As Sgt. Norman approached the driver's side of the Saab, he saw that the door was shut and the windows were closed. There were other vehicles parked in front of and beside Patterson's, but Sgt. Norman testified that he did not block Patterson's vehicle from backing out. Sgt. Norman looked through the car's side window and saw two people inside the vehicle. He observed nothing illegal. He tapped on the window, and said, in a voice loud enough to be heard over the engine, "please roll down the window."

[¶7] After Sgt. Norman tapped on the window, Patterson responded by opening the driver's side door. At that time, Sgt. Norman testified that he smelled cigarette smoke and alcohol, and he ordered Patterson out of the vehicle. Patterson was later charged with OUI (Class D), pursuant to 29-A M.R.S.A. § 2411(1), and operating after suspension (Class E), pursuant to 29-A M.R.S.A. § 2412-(A)(1), (3). Patterson entered a plea of not guilty, and filed a motion to suppress all evidence obtained after Sgt. Norman told Patterson to roll down the window. At the hearing on the motion, the trial court heard testimony from the two police officers who saw Patterson's vehicle that night.

[¶8] After the hearing, the court granted the motion to suppress on the grounds that Patterson was seized in the absence of any articulable suspicion for the seizure and therefore in violation of the Fourth Amendment. The State subsequently moved the court to enter findings of fact pursuant to M.R. Crim. P. 41A(d). The court granted the motion. In its written findings of fact, the court cited three factors that weighed in favor of its conclusion that a seizure took place: (1) Sgt. Norman was in uniform; (2) Patterson had an expectation of privacy inside his car; and (3) Sgt. Norman rapped on the driver's side window and requested that the window be rolled down. The court concluded that "more probably than not, the defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation."

II. DISCUSSION

[¶9] The State appeals the suppression ruling, arguing that because no detention or stop occurred, Sgt. Norman's conduct did not violate Patterson's Fourth Amendment rights. The State does not argue that the police had the requisite articulable suspicion to detain Patterson at the time Sgt. Norman approached the vehicle.[3] Therefore, the only issue we must decide is whether

---

[3] The police may make brief, investigatory stops of people on the basis of "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Moulton,* 1997 ME 228, ¶ 10, 704 A.2d 361, 364 (quoting *Terry v. Ohio,* 392 U.S. 1, 21 (1968)). Although the State raised the reasonable suspicion standard at the motion hearing, its brief to this Court does not argue that this encounter qualifies as a *Terry* stop.

(Continued on following page)

Sgt. Norman's actions constituted a seizure for purposes of the Fourth Amendment.

[¶10] The Fourth Amendment to the U.S. Constitution, and Article 1, Section 5 of the Maine Constitution, offer identical protection against unreasonable searches and seizures. *State v. Gulick,* 2000 ME 170, ¶ 9 n.3, 759 A.2d 1085, 1087. "An encounter between a police officer and a citizen implicates the Fourth Amendment only if the officer 'seizes' the citizen." *State v. Cilley,* 1998 ME 34, ¶ 7, 707 A.2d 79, 82. A seizure occurs when an officer, by a show of authority, in some way restrains a citizen such that "he is not free to walk away." *Id.* (quotation marks omitted). The test for whether a seizure has occurred is an objective one, i.e., whether a reasonable person would have believed that he was not free to leave. *See United States v. Mendenhall,* 446 U.S. 544, 554 (1980).

[¶11] The State does not dispute the factual findings entered below, but contends that the trial court erred as a matter of law in determining that Patterson was seized when Sgt. Norman tapped on his window and spoke to Patterson. We review independently whether a court's historical findings of fact constitute a seizure for Fourth Amendment purposes. *State v. Brewer,* 1999 ME 58, ¶ 10, 727 A.2d 352, 355.

[¶12] In *Brewer,* we determined that two police officers did not "seize" a motorist when they held out their badges and approached a parked vehicle. *Id.* ¶ 13, 727 A.2d at 355. We noted that "the agents did not display any weapons, position their vehicle to prevent Brewer from

---

Issues not briefed to this Court are not preserved. *Holland v. Sebunya,* 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209.

leaving, *give oral instructions to Brewer or Noyes,* or activate the police lights." *Id.* ¶ 13, 727 A.2d at 356 (emphasis added). We also noted that a seizure may occur by "the use of language or tone of voice that would indicate that compliance with the officer's request might be compelled." *Id.* ¶ 12, 727 A.2d at 355 (quoting *Mendenhall,* 446 U.S. 544, 554 (1980)).

[¶13] Unlike the agents in *Brewer,* the police officer in this case made verbal contact with Patterson, telling him to roll down his window. Whether this communication was sufficient to effect a seizure depends upon whether it was a polite request, or a command:

> [T]he mere approach and questioning of such persons does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. *A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so.*

WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE § 9.4(a) at 433 (2004) (emphasis added).

[¶14] The record reveals that the trial court was attuned to the significance of Sgt. Norman's statement to Patterson. At the hearing, immediately after listening to Sgt. Norman's testimony, the court identified the issue as whether Patterson "heard a request, which is . . . no problem or an order which raises questions of a seizure." The court concluded that based on the officer's conduct, a seizure occurred. The subsequent written findings of fact

reiterate the court's belief that Sgt. Norman's statement constituted an order.[4] Because a reasonable person would not feel free to disobey an order from a police officer, Sgt. Norman's command constituted a seizure, and the evidence obtained thereafter was properly suppressed.

[¶15] The State argues that our opinion in *Gulick* requires a different outcome. *Gulick* involved a driver who pulled into the parking lot of a closed medical care facility late at night. *Gulick,* 2000 ME 170, ¶ 17, 759 A.2d at 1089. The officer approached the vehicle and asked if the driver was okay. *Id.* ¶ 4, 759 A.2d at 1086. In this case, Sgt. Norman observed a vehicle parked among other cars in a well-used university parking lot. He did not have any concerns about the safety of the driver; rather, he was concerned that students might be drinking or smoking marijuana in the vehicle. Upon approaching the car, he did not smell any marijuana and saw no signs of illegal activity. Without any evidence that Patterson was in distress or acting illegally, Sgt. Norman instructed Patterson to roll down the window. The record supports the court's conclusion that a reasonable person in Patterson's position would not "feel free to decline the officers' requests or otherwise terminate the encounter." *United States v. Drayton,* 536 U.S. 194, 202 (2002) (quotation marks omitted).

---

[4] The State points to the court's written findings of fact, in which the court wrote that Sgt. Norman "rapped on the driver's side window and requested that the window be rolled down." According to the State, this constitutes a finding that Sgt. Norman's communication was a request, not an order. The court's very next sentence, and its comments at the hearing, make it clear that the court determined that the "request" was, in fact, an order that Patterson reasonably believed he could not ignore.

[¶16] This is an admittedly close case,[5] turning on the precise nature of Sgt. Norman's statement, and how a reasonable person would interpret that statement. The trial court heard the testimony of Sgt. Norman. As an appellate court, we decline to review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement. *See Lewisohn v. State,* 433 A.2d 351, 354 (Me. 1981). Because the trial court reasonably could have found that Sgt. Norman's comment constituted an order, we affirm the suppression order.

The entry is:

Judgment affirmed.

Attorneys for State:

R. Christopher Almy, District Attorney
C. Daniel Wood, Asst. Dist. Attorney
97 Hammond Street
Bangor, ME 04401

---

[5] Other courts confronting similar facts have come to differing conclusions. *See Borowicz v. North Dakota Dep't of Transp.,* 529 N.W.2d 186, 188 (N.D. 1995) (stating that stop arguably occurred when officer's instruction to open the door could be interpreted as an order); *Ebarb v. State,* 598 S.W.2d 842, 850 (Tex. Crim. App. 1979) (holding that officer's order to roll down window or open door creates a temporary seizure); *but see Akins v. State,* 596 S.E.2d 719, 722 (Ga. App. 2004) (holding that police may approach citizen and ask that he roll down the window, "as long as the officers do not detain the citizen or create the impression that the citizen may not leave"); *Medley v. State,* 630 So.2d 163, 165 (Ala. Crim.App. 1993) (holding that officer did not seize motorist when he tapped on window and asked driver to roll it down).

Attorney for defendant:

Seth D. Harrow, Esq.
The Silver Law Firm, P.A.
P O Box 844
Bangor, ME 04402-0844

STATE OF MAINE
PENOBSCOT, ss.

DISTRICT COURT
BANGOR
DOCKET NO: CR-04-850

STATE OF MAINE

v.

JOSHUA PATTERSON

FINDINGS OF FACT ON MOTION TO SUPPRESS

Just after midnight on January 31st Officer Nickerson of the University Police was patrolling the south campus. As she brought her cruiser to a stop on Sebago Road, she noted a vehicle proceeding northbound, coming from her left, on Munson Road. The operator of the second vehicle turn on directional signals indicating a left turn about 120' before the intersection. While Nickerson asserted that the blinker was on for an abnormally long distance before the turn, the law requires the signal to be made "at least 11 feet" before the turn. 29-A M.R.S.A. § 2071(2).

As the car passed the officer, she pulled out to follow. As she began to follow the car, Officer Nickerson radioed her supervisor to relate her continuing observations of the second car. The second car, having first slowed in preparation for a turn, resumed normal speed and the blinker was turned off. A short distance later the two vehicles came to a stop sign. The second car stopped appropriately and made a left turn onto a short street leading to College Avenue. At College Avenue the second car took another left and shortly thereafter turned into a University parking area at the steam plant.

Officer Nickerson was suspicious of the car's operation because of the apparent change in mind of the operator as to the turn and that the change of mind took place in

proximity to her marked police cruiser. She asked her Sergeant, who was patrolling in an unmarked car, to observe any further operation of the vehicle she was following. She described the vehicle as a red Saab and its entry into the steam plant parking lot.

Sergeant Norman was patrolling a short distance away. He immediately proceeded to the steam plant lot, spied the red Saab and noted that it was appropriately parked. It was a very cold evening and he also noted that the engine was still running in the Saab because he could see the exhaust.

The Sergeant watched the red Saab for about five minutes and saw the windows begin to steam up. He got out of his cruiser and approached the Saab and saw smoke emanating from the passenger side window. Amongst the various activities that could have been occurring in a parked car at that time of night, the Sergeant opined that smoking marijuana or consuming alcohol were two alternatives. He made no effort to detect whether the smoke was marijuana although he was able to note that it was cigarette smoke as he confronted the driver. He made no observations of any movements that would indicate that anyone in the vehicle was drinking. While the back window of the car was fogged up so he could not see through it, he was able to see through the side window.

Sergeant Norman had parked his car some distance away. He approached the red Saab from the driver's side. Had the operator wished to back out of the parking spot (there were cars on each side and in front of the Saab), he could have done so without harm to the officer.

Sergeant Norman was in uniform. He rapped on the operator's window and asked the operator to roll the window down.

As indicated at hearing, the determining factor for the Court was whether or not this was a seizure or simply an interaction, a conversation, between the Sergeant and the Defendant. The factors that led the Court to conclude that it was a seizure are:

1. The officer was in uniform;
2. The officer initiated the contact under circumstance in which an ordinary person in Defendant's situation would have expected privacy on public contact;
3. The Sergeant rapped on the driver's side window and requested that the window be rolled down.

The court finds that more probably than not, defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation.

Officer Nickerson acknowledged that she saw nothing that would warrant a stop of the vehicle. The sole reason for the Sergeant in taking the action that he did, temporarily seizing defendant, was that the occupants of the red Saab stayed in the car while parked for approximately five minutes after it came to a halt. Norman repeatedly commented on the oddity of the occupants remaining in the car in such cold weather. Since the engine was running, one could safely assume the heater was also running. The Sergeant saw nothing other than the smoke emanating from the driver's side window, which he was able to quickly identify as cigarette smoke when he neared the

car, that would substantiate his hunch that the occupants of the car were either consuming alcohol or smoking marijuana.

The Clerk shall enter the following on the docket:

"Findings of Fact on Motion to Suppress Filed."

Dated: June 29, 2004

/s/ Ronald D. Russell
Ronald D. Russell
Judge, Maine District Court

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

(3)

NO. 04-1491

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MAINE,

Petitioner,

vs.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ of Certiorari To
The Maine Supreme Judicial Court Sitting As
The Law Court

BRIEF OF COLORADO, ARIZONA, DISTRICT OF COLUMBIA, HAWAII, OKLAHOMA, UTAH, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN W. SUTHERS
Attorney General
JOHN J. KRAUSE
Interim Solicitor General
KATHERINE A. HANSEN*
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5785

**Counsel of Record*

TERRY GODDARD
Attorney General
State of Arizona

ROBERT J. SPAGNOLETTI
Attorney General
District of Columbia

MARK J. BENNETT
Attorney General
State of Hawaii

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM SORRELL
Attorney General
State of Vermont

TABLE OF CONTENTS

PAGE

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR GRANTING THE WRIT 4

I. There Is A Need For Guidance In The Area Of When A Seizure Occurs In The Context Of Street Encounters, Particularly In Light Of The Maine Law Court's Decision, Which Is In Direct Conflict With Decisions Of Other States And Circuits, And This Court's Own Decisions 5

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES

Adams v. State, 758 S.W.2d 709 (Ark.Ct.App. 1988) 10

Akins v. State, 596 S.E.2d 719 (Ga.Ct.App. 2004) 9

Borowicz v. North Dakota Department of Transportation, 529 N.W.2d 186 (N.D. 1995) 10

California v. Hodari D., 499 U.S. 621 (1991) 7

Ex Parte Betterton, 527 So.2d 747 (Ala. 1988) 10

Florida v. Bostick, 501 U.S. 429 (1991) 4, 6, 7, 11

Florida v. Rodriguez, 469 U.S. 1 (1984) 4, 7, 11

Florida v. Royer, 460 U.S. 491 (1983) 4, 6, 9, 11

I.N.S. v. Delgado, 466 U.S. 210 (1984) 4, 6, 7, 11, 12

Maine v. Patterson, 868 A.2d 188 (Me. 2005) 1, 3, 12

Medley v. State, 630 So.2d 163 (Ala.Crim.App. 1993) 9

Merideth v. State, 603 S.W.2d 872 (Tex.Cr.App. 1980) 10

Michigan v. Chesternut, 486 U.S. 567 (1988) 5, 13

People v. Clark, 541 N.E.2d 199 (Ill.App.Ct. 1989) 9

People v. Murray, 560 N.E.2d 309 (Ill. 1990) 9

Purce v. United States, 482 A.2d 772 (D.C. 1984) 9

State v. Boswell, 294 S.E.2d 287 (W.Va. 1982) 10

State v. Culbreath, 387 S.E.2d 255 (S.C. 1990) 9

State v. Knox, 939 P.2d 710 (Wash.Ct.App. 1997) 10

State v. Neyrey, 383 So.2d 1222 (La. 1979) 10

State v. O'Neill, 62 P.3d 489 (Wash. 2003) 10

TABLE OF AUTHORITIES

PAGE

State v. Zubizareta, 839 P.2d 1237 (Idaho 1992).....10

Terry v. Ohio, 392 U.S. 1 (1968) 1, 6, 12, 14

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005).....10

United States v. Carroll, 591 F.2d 1132 (5th Cir. 1979).....10

United States v. Drayton, 536 U.S. 194 (2002) ...4, 6, 7, 9, 11

United States v. Mendenhall, 446 U.S. 544 (1980).....1, 6, 11, 12

OTHER AUTHORITIES

4 W. LaFave, Search and Seizure, § 9.4(a) (4th ed. 2004).....7, 8, 13

INTEREST OF AMICI CURIAE

Amici States' interest arises from the fact that this case implicates one of the most common types of police-citizen contact: consensual street encounters. In *Maine v. Patterson*, 868 A.2d 188 (Me. 2005), the Maine Law Court addressed such an encounter and determined that a police officer's simple request, without any show of authority, constitutes a seizure under the Fourth Amendment.[1] This decision demonstrates a need for clarity and guidance on the issue of when a police-citizen encounter that occurs in a public place involving pedestrians or persons in parked cars constitutes a Fourth Amendment seizure.

Amici States have a compelling interest in this case, both because the Maine Law Court's conclusion is contrary to this Court's decisions addressing the issue of when a seizure occurs, and because it is contrary to numerous decisions of other courts that have addressed similar facts to those presented here. *Maine v. Patterson* undermines the strong public policy in favor of legitimate police investigation, and erodes the concept this Court has recognized that the police may engage in actions that would otherwise be acceptable if performed by private citizens. *See United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *Terry v. Ohio*, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring). The Maine Law Court's holding that a seizure occurs when a police officer approaches a parked vehicle and requests that the window be rolled down chills the right of

---

[1] The judgment at issue in this case was rendered by the Maine Supreme Judicial Court sitting as the Law Court. To maintain consistency with the terms used by the Maine Attorney General in the Petition for a Writ of Certiorari to refer to this court, the term "Maine Law Court" will be used here as well.

the police to engage in lawful conduct, both in investigating crime and in ensuring the welfare and safety of citizens. Because this decision could be relied on by other states in reaching a similarly erroneous conclusion, because this decision significantly alters the reasonable police officer's perception of what conduct he or she may lawfully engage in, and because this decision is wrong, this Court should grant certiorari.

STATEMENT OF THE CASE AND FACTS

On January 31, 2004, just after midnight, Officer Nickerson with the University of Maine Police Department was on routine patrol when she spotted a car engaged in legal, yet suspicious, maneuvers, so she decided to follow it. After the car entered a parking lot on the University of Maine campus, Officer Nickerson asked Sergeant Norman to take over. Sergeant Norman was driving an unmarked police car, and at no point did he activate any of the car's emergency lights or spotlights. Sergeant Norman arrived at the parking lot, and saw the car, parked, with its engine running. The sergeant parked his patrol car about fifteen feet behind and observed the car for about five minutes. It was a very cold night, and as he watched, no one exited the car, and the windows began to steam up.

Sergeant Norman walked up to the driver's side of the car. Although he was in uniform, he did not have his weapon visible. When the sergeant reached the driver's side, he tapped on the window, as neither of the two occupants of the car appeared to have seen him. In a voice just loud enough to be heard over the engine, he asked "please roll down the window."

The driver, later identified as the Respondent Patterson, opened the door. At this point, Sergeant Norman

noticed a heavy odor of alcohol. Upon smelling the alcohol, the sergeant asked the Respondent to step out of the car, and he was thereafter arrested and charged with operating a vehicle under the influence.

The Respondent filed a motion to suppress all evidence obtained subsequent to the request. After a hearing, the District Court granted the motion to suppress. The District Court held that this was a Fourth Amendment seizure based on the following three factors: 1) the sergeant was in uniform; 2) the defendant had an expectation of privacy in his car; and 3) the sergeant rapped on the driver's side window and requested that the window be rolled down. The District Court concluded that "more probably than not, defendant perceived the Sergeant's acts and words as a command from a police officer and not as a request for a conversation."

The Petitioner filed an interlocutory appeal to the Maine Law Court, which affirmed the order granting the motion to suppress. *See Maine v. Patterson*, 868 A.2d 188 (Me. 2005).[2] The Maine Law Court recognized that the question centered on the applicable measure of what constituted a show of authority: "whether [the sergeant's] communication was sufficient to effect a seizure depends

---

[2] The Maine Law Court indicated that as an appellate court, it would decline to "review a cold transcript and draw our own factual inferences about the tone of voice, volume, and circumstances of Sgt. Norman's statement." However, the District Court, in finding a seizure and granting the motion to suppress, did not rely at all on the sergeant's "tone of voice" or the "volume" of his statement. The District Court simply based its ruling on the objective facts that the sergeant rapped on the window and "requested" that the window be rolled down.

upon whether it was a police request, or a command," and later noted that "[t]his is an admittedly close case." The Maine Law Court also recognized that "other courts confronting similar facts have come to differing conclusions."

REASONS FOR GRANTING THE WRIT

This Court should grant the petition because courts and law enforcement officers need guidance in the area of police-citizen street encounters, with regard to what constitutes a seizure under the Fourth Amendment. The question frequently turns on whether there is a show of authority, and the determination is often based on whether the officer made a request or a command. Indeed, this case provides a perfect example of why guidance is needed. A simple request to roll down a window during a police-citizen street encounter, without more, now constitutes a Fourth Amendment seizure in Maine, but such a request will not likely constitute a seizure in most other states, or where a federal offense is involved. This disparity is not only difficult for law enforcement officers, who must deal with this issue on a frequent basis, but it is potentially damaging to Fourth Amendment law across this country.

This Court should also grant the petition, not only to resolve the conflict between the Maine Law Court's decision and the decisions of numerous other courts where similar facts yielded a conclusion that no seizure occurred, but also the conflict between it and this Court's decisions in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*.[3] Consistency is

---

[3] *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Florida v. Royer*, 460 U.S. 491 (1983).

important in the area of Fourth Amendment law, as it guides the future actions of courts and law enforcement officers nationwide, and serves to protect the rights of citizens *and* the legitimate function of law enforcement. This Court should provide this consistency by granting the petition and reversing the Maine Law Court's decision.

I. There Is A Need For Guidance In The Area Of When A Seizure Occurs In The Context Of Street Encounters, Particularly In Light Of The Maine Law Court's Decision, Which Is In Direct Conflict With Decisions Of Other States And Circuits, And This Court's Own Decisions.

The Maine decision highlights the need for guidance from this Court in the area of police-citizen street encounters. Maine construed the reach of the Fourth Amendment in an unduly expansive manner, holding that a knock on a car window accompanied by a request to roll down the window constituted a seizure. Decisions from other federal and state courts considering a "show of authority" by an officer have reached different results. While this Court has provided general standards for what constitutes a seizure, these cases demonstrate that further articulation of the appropriate considerations for what constitutes a "show of authority" is needed.

This Court has held that the test for deciding whether an encounter constitutes a "seizure" for Fourth Amendment purposes is whether a reasonable person under the circumstances would have believed he or she was free to leave. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). When a person is in a place where he or she cannot leave or desires not to leave, this Court has articulated the test as follows: "[s]o long as a reasonable person would feel free to

'disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." *Bostick*, 501 U.S. at 434. Thus, the appropriate inquiry for all settings is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *Bostick*, 501 U.S. at 436; *Drayton*, 536 U.S. at 201.

However, "not all personal intercourse between policeman and citizens involve 'seizures' of persons." *Terry*, 392 U.S. at 19 n16. Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in a public place and asking him or her questions. Instead, it is only when the officer restrains a citizen through physical force or a show of authority that a seizure has occurred. *I.N.S.*, 466 U.S. at 215; *Mendenhall*, 446 U.S. at 552. Circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554. This last circumstance was the focus of the Maine Law Court's determination, and it is an area that needs further clarification by this Court.

This Court has addressed guidelines for what constitutes a seizure in a few discrete contexts: in airports, on buses, and in workplaces. In *Royer*, this Court held that asking for and examining Royer's airline ticket were permissible, but when the officers told Royer that he was suspected of transporting narcotics and asked him to accompany them to the police room, while retaining his ticket and driver's license, Royer was effectively seized at that point. *Royer*, 460 U.S. 491. This analysis indicates that a simple request, without more, does not constitute a seizure.

See also I.N.S., 466 U.S. at 216 (simple request for identification not a seizure); *Bostick*, 501 U.S. at 434,437 (request to examine identification or for consent to search luggage not a seizure; "no seizure occurs when police ask questions of an individual ... so long as the officers do not convey a message that compliance with their requests is required."); *Rodriguez*, 469 U.S. at 5-6 (initial contact where officers simply asked if defendant would step aside and talk with them was a consensual encounter); *Drayton*, 536 U.S. at 203-204 (request for consent to search luggage is not a seizure).

However, this Court has not yet applied or developed the analysis in the context of street encounters. As the instant case pointedly demonstrates, clarification of this test in the context of street encounters is necessary. What often arises in this context is an issue of whether the officer engaged in a show of authority, and the lower courts and members of law enforcement need further guidance from this Court on this point.

This Court has previously recognized that the general test for what constitutes a "show of authority" is an objective one, addressing "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. *California v. Hodari D.*, 499 U.S. 621, 628 (1991). "The critical factor is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens." 4 W. LaFave, *Search and Seizure*, § 9.4(a) at 425-426 (4th ed. 2004). LaFave suggests that there is no seizure if the officer "'did not order the defendant' to do something or 'demand that he' do it...". *Id.*, at 426.

Specifically, with regard to contact with persons in parked cars, LaFave observes:

> [T]he mere approach and questioning of [persons seated within parked vehicles] does not constitute a seizure. The result is not otherwise when the officer utilizes some generally accepted means of gaining the attention of the vehicle occupant or encouraging him to eliminate any barrier to conversation. The officer may tap on the window and perhaps even open the door if the occupant is asleep. A request that the suspect open the door or roll down the window would seem equally permissible, but the same would not be true of an order that he do so.

4 W. LaFave, *Search and Seizure*, § 9.4(a), at 433 (4th ed. 2004).

By holding that a request to roll down a window constitutes a seizure, the Maine Law Court has imposed an unreasonable restriction on when a law enforcement officer may contact a person in a parked car without reasonable suspicion that he or she has engaged in criminal activity. As indicated above, the sergeant simply knocked on the window and requested that the driver roll the window down. There was no other factor present that could be properly considered

a "show of authority."[4]

The Maine Law Court's resolution of this issue is directly contradictory to the conclusion reached by many courts in this country: that knocking on a window of a parked car and asking or requesting that the occupant roll the window down or exit the car is not a seizure. *See e.g.*, *Purce v. United States*, 482 A.2d 772, 777 (D.C. 1984) (no seizure where officer approached car parked in lot, tapped on window, and asked driver to roll down the window); *Medley v. State*, 630 So.2d 163, 165 (Ala.Crim.App. 1993) (no probable cause or reasonable suspicion required where officer approached parked car, tapped on window, and requested that the driver roll down the window); *Akins v. State*, 596 S.E.2d 719, 721 (Ga.Ct.App. 2004) (no seizure where officer approached passenger side of parked car and asked passenger to roll down her window); *People v. Murray*, 560 N.E.2d 309, 314 (Ill. 1990) (no seizure where two officers approached car parked on side of road, one officer knocked on window and asked defendant to step out of the car); *People v. Clark*, 541 N.E.2d 199, 203 (Ill.App.Ct. 1989) (no seizure where car was parked in gas station lot and officer approached driver, knocked on window and indicated to the driver to roll down window); *State v. Culbreath*, 387 S.E.2d 255, 257 (S.C. 1990), *abrogated on other grounds by Horton v. California,* 496 U.S. 128 (1990) (no seizure where officer tapped on window of parked car and motioned for driver to roll down window);

---

[4] Contrary to the District Court's ruling in this case, the fact that the officer was wearing a uniform does not constitute or contribute to a conclusion that there was a show of authority. *See Drayton*, 536 U.S. at 205; *Royer*, 460 U.S. at 497 (the fact that an officer identifies himself as a police officer, whether it be by the wearing of a uniform or the display of a badge, does not convert the encounter into a seizure).

State v. O'Neill, 62 P.3d 489, 497-498 (Wash. 2003) (where officer turned spotlight on parked car to see license plate, then approached car with flashlight directed at the driver's face and asked the driver to roll down window, no seizure); *State v. Knox*, 939 P.2d 710, 714-715 (Wash.Ct.App. 1997), *overruled on other grounds by State v. O'Neill*, 62 P.3d 489 (Wash. 2003) (no seizure where officer motioned for driver of car parked on ferry to roll down the window).[5]

However, at least two jurisdictions have held, as Maine has, that a knock on a window accompanied by a request to roll down the window or open the door, constitutes a seizure. *See United States v. Carroll*, 591 F.2d 1132, 1135 (5th Cir. 1979) (stop occurred where officers approached parked car, tapped on the window, and subsequently questioned the occupant); *Borowicz v. North Dakota Department of Transportation*, 529 N.W.2d 186, 188 (N.D. 1995) (implying seizure occurred where officer approached

---

[5] Many courts have also held that approaching a parked car and simply knocking on the window to gain the occupant's attention is not a seizure. *See e.g.*, *United States v. Barry*, 394 F.3d 1070, 1075 (8th Cir. 2005); *Ex Parte Betterton*, 527 So.2d 747, 750 (Ala. 1988); *Adams v. State*, 758 S.W.2d 709, 712 (Ark.Ct.App. 1988); *State v. Zubizareta*, 839 P.2d 1237, 1241 (Idaho 1992); *Merideth v. State*, 603 S.W.2d 872, 873 (Tex.Cr.App. 1980); *State v. Boswell*, 294 S.E.2d 287, 294-295 (W.Va. 1982); *see also State v. Neyrey*, 383 So.2d 1222, 1224 (La. 1979) (no seizure where officer approached parked car, knocked on window, and after occupant failed to respond as he was either asleep or unconscious, officer opened door and shook occupant awake). There is no rational basis to distinguish a simple knocking from a knocking accompanied by a request to roll down the window: a reasonable inference from the knocking alone is that the officer desires to speak with the occupant.

parked car, knocked on window, and requested that occupant open door).

There is simply no rational distinction to explain how circumstances such as those in the vast majority of the cases cited above are not seizures, but a request to roll down a window, as decided by the Maine Law Court, is a Fourth Amendment seizure. Indeed, the sergeant here prefaced his request with the word "please." It is hard to imagine a word more closely associated with the concept of a request than the word "please."

The Maine Law Court's decision is also contrary to the pronouncements made by this Court in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*. This Court has held that, in general, an officer is entitled to address a citizen and pose questions to that person. *Mendenhall*, 446 U.S at 553. As indicated above, in several cases but in other contexts, this Court has held that a request, without more, does not constitute a seizure under the Fourth Amendment. Because a request, without more, is exactly what occurred in the instant case, the Maine Law Court decided this case contrary to this Court's decisions in *Royer*, *I.N.S.*, *Bostick*, *Rodriguez*, and *Drayton*.[6]

Although the state and federal circuit cases cited above demonstrate that most courts have properly followed this Court's general pronouncements and found no seizure under similar facts as those presented here, at least three courts have now reached a contrary conclusion upon

---

[6] Again, the District Court and Maine Law Court did not rely on any aspect of the request to roll down the window other than the objective fact of the request itself. The District Court did not rely on the officer's tone or volume of voice in any manner.

essentially the same facts. As indicated above, consistency is important in the area of Fourth Amendment law, particularly because it provides the most important source of guidance for law enforcement. Because this Court has not addressed the concept of a seizure in the context of a street encounter such as that presented here, inconsistency in opinions from the lower courts has occurred, and may continue. This Court should address this area of the law, reaffirm that a request alone does not constitute a seizure, and provide guidelines to ensure that no additional courts reach contradictory and similarly erroneous conclusions as the one reached in *Maine v. Patterson*.

The need for guidance and consistency is not only important for the effective and appropriate resolution of criminal cases, it is vitally important to law enforcement as well. The purpose of the Fourth Amendment is not to eliminate all contact between the police and private citizens, but to prevent "arbitrary and oppressive interference" by the police. *I.N.S.*, 466 U.S. at 215; *Mendenhall*, 446 U.S. at 553. This Court has often recognized the need for protection of legitimate law enforcement practices, and has declined to create unnecessary restrictions on the police that do not further the purposes of the Fourth Amendment. *Mendenhall*, 446 U.S. at 554 (recognizing the need for police questioning as a tool in the effective enforcement of the criminal laws). Indeed, this Court noted that "[w]ithout such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." *Mendenhall*, 446 U.S. at 554.

And, in addition to law enforcement-related purposes, the police often contact citizens for reasons wholly unrelated to a desire to prosecute that person for a crime. *Terry*, 392 U.S. at 13. For example, the police may need to

contact a person to determine whether that person needs medical or other assistance. The police may also need to contact persons to determine if they witnessed some other crime. Undoubtedly, there are many more instances where the police may legitimately desire to contact an individual on the street for reasons other than investigating that person for criminal conduct. There can be no real question that police-citizen street encounters serve many useful and lawful purposes.

"[A]ny test intended to determine what street encounters are not seizures must be expressed in terms that can be understood and applied by the officer." 4 W. LaFave, *Search and Seizure*, § 9.4(a) at 414 (4th ed. 2004); *see also Chesternut*, 486 U.S. at 574 (use of objective standard when determining whether seizure occurred "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."). The Maine Law Court's conclusion demonstrates that there is a certain amount of confusion in the area of what constitutes a command and, consequently, a seizure. For law enforcement officers in Maine and a few other jurisdictions, the guidelines as to what constitutes a seizure are significantly more restrictive than the standards in most other states. And, it appears as if officers in Maine can now almost never contact persons in parked cars, unless they remain completely silent and wait for the individual to speak first - a restriction particularly unreasonable in situations involving caretaking or welfare checks where the person inside the car may be unaware of the officer's presence and in need of swift assistance. This cannot be the standard for proper police conduct.

As indicated above, this Court has recognized the need for legitimate police contact with private citizens, and the Maine Law Court's decision threatens that lawful

practice. And, because the Maine Law Court's decision is contrary to the significant weight of caselaw across this country, and is fundamentally flawed in that it does not apply the proper standards set forth by this Court, this Court should grant certiorari to not only give guidance to other courts addressing this issue in the future, but also to provide law enforcement officers with some direction as to when they may contact citizens when they have insufficient information to conduct a *Terry* investigative detention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General of Colorado
JOHN J. KRAUSE
Interim Solicitor General of Colorado
KATHERINE A. HANSEN*
Assistant Attorney General
**Counsel of Record*

1525 Sherman Street, 5th Floor
Denver, CO 80203
Telephone: (303) 866-5785
Counsel for Amici States

(2)

No. 04-1491

Supreme Court, U.S.
FILED
JUL 19 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF MAINE,

Petitioner,

v.

JOSHUA PATTERSON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF IN OPPOSITION

SETH D. HARROW, ESQ.
VAFIADES, BROUNTAS & KOMINSKY, LLP
P.O. Box 919
Bangor, ME 04402-0919
(207) 947-6915

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
BRIEF IN OPPOSITION	1
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	1
REASONS FOR DECLINING REVIEW	4
I. The Asserted Error Rests Largely on an Alleged Erroneous Factual Finding/Misapplication of a Properly Stated Rule of Law	4
II. The Decision of the Maine Supreme Judicial Court is in Harmony with Well Established Fourth Amendment Jurisprudence of this Court and Others	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

Crowley v. Dubac, 430 A.2d 549 (Me. 1981) 5

Lewisohn v. State, 433 A.2d 351 (Me. 1981) 5

State v. Cilley, 1998 ME 34, 707 A.2d 79 4

United States v. Drayton, 536 U.S. 194 (2002) 8

United States v. Mendenhall, 446 U.S. 544 (1980) 5, 7

United States v. Viegas, 639 F.2d 42 (1st Cir. 1981) 4

VanVoorhees v. Dodge, 679 A.2d 1077 (Me. 1996) 5

CONSTITUTIONAL PROVISION:

U.S. Const. amend. IV 5, 9

STATUTORY PROVISIONS & RULES:

28 U.S.C. § 1257 1

29 M.R.S.A. § 2412-A(1), (3) 3

29-A M.R.S.A. § 2411(1) 3

M.R.Crim.P. 41A 3

Sup. Ct. R. 10 7

MISCELLANEOUS:

4 W. LaFave, *Search & Seizure*, § 9.3(a), at 107 (1996 & Supp. 2004) 7

BRIEF IN OPPOSITION

Pursuant to Rule 15 of the United States Supreme Court and the Order of this Honorable Court of June 20, 2005, the Respondent in this matter, Joshua Patterson, by and through his counsel, Seth D. Harrow, Esq. and Vafiades, Brountas & Kominsky, LLP, files this Brief in Opposition to the State of Maine's Petition for a Writ of Certiorari Respondent Patterson respectfully asks this Court to deny the petition seeking review of the judgment of the Maine Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is officially reported at 2005 ME 26, 868 A.2d 188. The Order of the Maine District Court granting Patterson's motion to suppress is unreported, but reprinted in full in the State's Petition for Certiorari. (Pet. App. 10-13).

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on February 9, 2005. The jurisdiction for this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

A little after midnight on January 31, 2004, Joshua Patterson, a college-aged individual, was operating a motor vehicle on Munson Road on the campus of the University of Maine. At the same time Officer Nickerson

of the University Police was patrolling that area of the campus and observed a red Saab operated by Patterson. Officer Nickerson observed the Patterson vehicle activate its left turn signal, slow its legal speed in preparation for the turn, and then resume normal speed and deactivate the turn signal. The officer then began to follow the Patterson vehicle which continued to travel down Munson Road at a normal speed and without any erratic or otherwise suspicious operation. At the intersection of Munson Road and College Avenue, the Patterson vehicle stopped appropriately at the stop sign and turned onto College Avenue. The Patterson vehicle then proceeded along College Avenue until it reached the University parking area located at the steam plant where it turned in and parked. The officer acknowledged on the stand that she carefully observed the Patterson vehicle for approximately a mile and saw nothing that would warrant a stop of it or that would otherwise indicate that criminal activity had occurred or was underfoot.

Officer Nickerson then radioed Sergeant Norman who was patrolling in the area in an unmarked car and requested him to observe any further operation of the Patterson vehicle. The sergeant proceeded to the steam plant parking lot and located the red Saab that had been operated by Patterson. The sergeant observed the vehicle for roughly five minutes. It was appropriately parked with cars to either side of it and in front of it. He could see that the engine was still running since the vehicle's exhaust was visible in the cold air. The sergeant speculated that among the various activities that could be occurring inside the red Saab at this time was the consumption of alcoholic beverages or the use of marijuana. However, since the back window of the vehicle had fogged up he could see

nothing inside to substantiate this hunch and, when questioned, admitted that many lawful activities could also be occurring inside the car. During the roughly five minutes the sergeant observed the vehicle at issue, he saw nothing that would indicate that the individuals inside were in need of assistance or that criminal activity had occurred or was underfoot. The sergeant then approached the vehicle and, upon reaching the driver's side window, peered into the car. He was able to see through this window and again saw nothing to indicate criminal activity was occurring or that the occupants had a need for assistance. Despite this, he rapped on the window and orally commanded Patterson to roll it down.

The sergeant was in full uniform at the time and was wearing a weapon that could have been visible. The sergeant indicated that he made it obvious that he expected to speak to Patterson at that time and if Patterson had chosen to ignore him, he would not have walked away. The District Court found it more probable than not that the sergeant's acts and words were perceived by Patterson as a command from the sergeant and not simply a request for communication.

The evidence obtained from this unlawful detention resulted in Patterson's being charged with criminal OUI, 29-A M.R.S.A. § 2411(1) (Class D), as well as Operating after Suspension, 29 M.R.S.A. § 2412-A(1), (3) (Class E), via a Complaint dated February 26, 2004. The undersigned counsel filed a Motion to Suppress the illegally obtained evidence pursuant to M.R.Crim.P. 41A within 21 days of Patterson's arraignment and a hearing was held on that motion on May 26, 2004. Following the hearing, the District Court granted the motion suppressing all evidence as a result of the unlawful search and seizure of Patterson.

The State filed a Motion for Further Findings of Fact and Conclusions of Law which was granted and filed by the District Court on June 29, 2004. The State then appealed the District Court's lawful suppression to the Maine Supreme Judicial Court which upheld the suppression order. The State's Writ for Certiorari seeking review of that decision is now pending in this Court.

REASONS FOR DECLINING REVIEW

There are two compelling reasons why it would be inappropriate under this Court's own guidelines for this matter to be heard. First, the asserted error rests largely on an alleged erroneous factual finding/misapplication of a properly stated rule of law. On this note the State badly and brazenly misstates a key factual finding of the trial court that bears on what issues would be before this Court if the writ for certiorari were granted. Secondly, the decision of the Maine Supreme Judicial Court is in harmony with well established Fourth Amendment jurisprudence of this Court and others.

I. The Asserted Error Rests Largely on an Alleged Erroneous Factual Finding/Misapplication of a Properly Stated Rule of Law.

It is well settled Fourth Amendment jurisprudence that a seizure occurs when an officer, by a show of authority, in some ways restrains a citizen such that he is not free to walk away. *State v. Cilley*, 1998 ME 34, ¶7, 707 A.2d 79, 82; *United States v. Viegas*, 639 F.2d 42, 44 (1st Cir. 1981). Similarly, this Court has stated:

> "[w]e conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, *or the use of language or voice indicating that compliance with the officer's request might by compelled.*" *Id.* (emphasis added).

Here, the trial court, which saw and heard the evidence, correctly found Patterson was seized within the meaning of the Fourth Amendment as he was not free to leave. Of note, the Maine Supreme Judicial Court has repeatedly stated that "the function of an appellate court is not to review a cold transcript and draw its own factual inferences . . . " *Lewisohn v. State*, 433 A.2d 351, 354 (Me. 1981). Rather, the Court's function is to review the record to determine whether there is any evidence to support the trial court's findings. *VanVoorhees v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). Such findings are conclusive under Maine law even if there is evidence in the record that could have supported a contrary determination. *Crowley v. Dubac*, 430 A.2d 549, 551 (Me. 1981).

The factual evidence in the record amply supports this finding which is conclusive on this Court. *Crowley*, 430 A.2d at 551. This evidence includes that the sergeant was in uniform and wearing a weapon; the sergeant initiated the contact under circumstances in which an ordinary person in Patterson's situation expected privacy; the

sergeant rapped on the driver's side window and commanded that it be rolled down; and most importantly, *Patterson perceived the sergeant's acts and words as a command.* (App. at A-5, A-6). This significant finding – that Patterson perceived the sergeant's act to be a command – cannot be said to be clear error based on the record and amply supports the trial court's conclusion that Patterson was seized for Fourth Amendment purposes because he reasonably believed he was not free to ignore the sergeant's command and walk away. The State of Maine, both below in front of the Maine Supreme Court, and here before this Court have attempted to confuse the issue by indicating that the trial court merely found that the officer simply requested Patterson to role down the window rather than commanding him to do so. This statement by the State is simply untrue and contrary to the trial court's decision.

As the Maine Supreme Court wrote, "[t]he record reveals that the trial court was attuned to the significance of Sgt. Norman's statement to Patterson. At the hearing, immediately after listening to Sgt. Norman's testimony, the court identified the issue as whether Patterson 'heard a request, which is . . . no problem or an order which raises questions of a seizure.' The court concluded that based on the officer's conduct, a seizure occurred." (Pet. App. 6-7). The State in alleging that the trial court merely found Patterson was requested to roll down his window focuses in on the trial court's written finding of fact, in which the court wrote that Sgt. Norman "rapped on the driver's side window and requested that the window be rolled down." The Maine Supreme Court correctly saw through the State's argument that this one sentence was taken out of context and made clear in its opinion at footnote 4 (Pet.

App. 7) that it correctly understood that the trial court had in fact determined that the "request" was, in fact, an order that Patterson reasonably believed he could not ignore.

Consistent with Rule 10 of the Rules of this Court further review of this matter should be declined due to the fact that the asserted error by the Petitioner State is simply a factual one/misapplication of a properly stated rule of law.

II. The Decision of the Maine Supreme Judicial Court is in Harmony with Well Established Fourth Amendment Jurisprudence of this Court and Others.

The second compelling reason for this Court to deny certiorari is that the decision of the Maine Supreme Judicial Court in this matter is in harmony with well established Fourth Amendment jurisprudence of this Court and others.

As stated above a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. The trial court's decision in this matter is therefore consistent with the rule of *Mendenhall* as well as Professor LaFave's analysis of this issue in his well-known treatise on search and seizure law. Professor LaFave has indicated "[a] request that the suspect open the door or roll down the window would seem permissible, *but the same would not be true of an order that he do so.*" 4 W. LaFave, *Search & Seizure*, § 9.3(a), p. 107 (1996 & Supp. 2004) (emphasis added); *see also* n. 93 citing collected cases.

Finally, the decision in this matter is consistent with this Court's recent decision set forth in *United States v. Drayton*, 536 U.S. 194 (2002). In *Drayton*, this Court held that a law enforcement officer does not violate the Fourth Amendment by approaching an individual in a public place and asking him questions if he is willing to listen, even if there is no basis for suspecting him of wrongdoing. *Id.* at 200-201. Here, the State did not approach Patterson in a public place; rather the officers approached him while he was in his vehicle, a place where the District Court found an ordinary person in Patterson's situation would have expected privacy. More significantly, the State did not merely approach Patterson and ask a willing listener some questions. Instead, the Sergeant demanded Patterson's attention and commanded him to respond to his inquiry. In fact, this Court in *Drayton* specifically stated: "[t]here was ample grounds for the District court to conclude 'that everything that took place between Officer Lang and [respondents] suggest that it was cooperative' and that there 'was nothing coercive [or] confrontational about the encounter.' There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exists, no threat, no *command*, not even an authoritative one of voice." *Id.* at 204 (emphasis added). Here, the trial court has, as set forth in its opinion, explicitly found the exact opposite – that Patterson reasonably believed he had to cooperate as the sergeant's inquiry was a *command* and not a request for a conversation. Therefore, Patterson reasonably believed he was not free to leave and the trial court's determination that this encounter with the sergeant implicated the Fourth Amendment was entirely consistent with this

Court's and other Court's Fourth Amendment jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SETH D. HARROW, ESQ.
VAFIADES, BROUNTAS & KOMINSKY, LLP
P.O. Box 919
Bangor, ME 04402-0919
(207) 947-6915
Attorney for Respondent